No. 22635

In the

United States Court of Appeals

For the Ninth Circuit

PETRA WILLIAMS,

Appellant,

vs.

FRANK J. KULIKOWSKI and MARIE ANN KULIKOWSKI, husband and wife,

Appellees.

Opening Brief of Appellant Petra Williams

SNELL & WILMER
MARK WILMER
400 Security Building
Phoenix, Arizona 85004
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA. 346 FIRST STREET. SAN FRANCISCO 94105

SUBJECT INDEX

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JURISDICTION

(a) The District Court.

This litigation was begun by the filing of a civil complaint for damages by Stephen A. Barzelis, Personal Representative and Administrator of the Estate of Dena Barzelis, deceased, and Katherine Cotsirilos, as plaintiffs, against Frank J. Kulikowski and Marie Ann Kulikowski, husband and wife and Petra Williams, a widow, as defendants, in the United States District Court for the District of Arizona.

At the same time Petra Williams was driving a Thunderbird automobile in a westerly direction upon Maryland Avenue, which street intersected North Seventh Avenue at right angles.

A collision occurred between the two vehicles as a result of which Dena Barzelis died from injuries received in the collision shortly thereafter. Katherine Cotsirilos was also injured as was Marie Ann Kulikowski and Petra Williams.

The administrator of the estate of Dena Barzelis sued Frank J. Kulikowski and Marie Ann Kulikowski and Petra Williams for the claimed wrongful death of Dena Barzelis and the passenger Cotsirilos sued for personal injuries. While "John Doe" Williams was sued as husband of Petra Williams it developed Mrs. Williams had been a widow since 1951.

The defendants Kulikowski cross-claimed against Petra Williams for personal injuries suffered by Mrs. Kulikowski in the accident and Petra Williams cross-claimed against Mr. and Mrs. Kulikowski for personal injuries suffered by Mrs. Williams in the collision.

The suit of Barzelis and Cotsirilos was disposed of without trial and the trial in the court below, the subject of this appeal, was upon the respective cross-claims of Kulikowski vs. Williams and Williams vs. Kulikowski. The cross-claim of the Kulikowskis sought general and special damages in the amount of $71,725.00 plus costs of suit.

In view of the limited issues raised by this appeal we state only the ultimate facts as to the injuries suffered by Mrs. Kulikowski, viewed in the light most favorable to her and her husband.

While several physicians and a dentist attended Mrs. Kulikowski, only one surgeon, Dr. Paul James Nichols, testified as to her injuries and treatment.

Mrs. Kulikowski was seen by Dr. Paul James Nichols, a qualified orthopedic surgeon, in the emergency room at St. Joseph's Hospital shortly after the accident. (R.T. 176)

She was complaining of and had symptoms referrable to her left foot and ankle and pelvis. She was oriented but in considerable pain. (R.T. 177)

Her blood pressure, pulse and respiration were within normal limits. (R.T. 178)

She had "associated bruises and contusions and lacerations that would go along with an accident of the severity that she had." (R.T. 179)

X rays were made of Mrs. Kulikowski's pelvis which revealed fractures about the inferior aspect of the pelvis on the left side. (R.T. 180)

X rays also disclosed a fracture of the talus, the bone of the foot that articulates in the ankle joint. It was a comminuted fracture. (R.T. 180)

Mrs. Kulikowski was hospitalized and the fracture of the talus was reduced by a closed reduction under general anesthesia (R.T. 181, 182) and a cast was placed on the foot to hold it in position.

She was placed on a firm mattress because of her pelvic injury; she developed pneumonia from which she recovered without difficulty. (R.T. 183) She was discharged from the hospital March 7, 1963, 47 days after her admission. (R.T. 183)

While the surgeon was concerned "about the vascular status of her foot" she never had any problems regarding that foot in terms of blood supply. (R.T. 183)

After leaving the hospital she was in a wheel chair because, in part, her pelvic fractures had not fully healed. (R.T. 183) She graduated to crutches and finally progressed to where she used a cane. (R.T. 184)

Because of some lack of blood supply the talus developed some degree of aseptic necrosis, "a fancy name for meaning that the bone has been deprived of some of its blood supply and, therefore, has lost some of its strength and, therefore, in some respects collapses a bit." (R.T. 186)

She developed a significant arthritic condition of her left ankle and arch supports and different types of shoes were used to alleviate her pain. (R.T. 187)

The pain is only associated with motion of the ankle and a fusion of the ankle joint would greatly diminish the pain. (R.T. 188) This fusion would leave her with a stiff ankle which would be without pain. (R.T. 188)

She would then walk quite well but would have some discomfort of the foot. (R.T. 189)

A fusion would involve a surgical fee of about $350.00, an anesthetic fee of $60.00-$70.00, and two to three weeks hospitalization at probably $40.00 per day. (R.T. 189, 190) Because Mrs. Kulikowski has favored her injured left foot she has a significantly smaller calf of her left leg and she testified that she suffers continued discomfort. (R.T. 190)

The Pontiac automobile was valued at $150.00.

In the hospital after the accident she had ice packs around her head and her lips were terrifically swollen, she had cuts inside her mouth and stitches on her fingers. She was under heavy opiates. (R.T. 158)

She was in bed a month after returning home from the hospital, then used a wheel chair and crutches. (R.T. 159)

She returned to work on crutches, then used a cane about two years. At times she would go back to it. (R.T. 160)

After returning to work her foot would swell after she sat for a long time and a box was provided so she could elevate her leg. (R.T. 160)

After she returned to work she worked regularly. (R.T. 161)

Mrs. Kulikowski testified that her ribs hurt and that she was black and blue all over. (R.T. 120) Her teeth and bridge were all wedged in—a dentist came to the hospital to remove some of her bridgework and her rings were broken. (R.T. 120) Her work required that she sit all day and she had trouble getting her circulation going after sitting long periods of time—elevating her foot helped. (R.T. 122, 123)

She lost $3,500 in wages.

Mrs. Kulikowski testified she continues to experience pain in her ankle which extends up her leg and she wears a special shoe because of her injury. She claimed additional injury—a very bad knee—but the only qualified medical expert who testified, Dr. Nichols (R.T. 173 et seq.) did not report any injury or disability, except to the ankle. This disability and pain he testified would be largely eliminated by a relatively inexpensive fusion which would leave some continuing discomfort to the foot itself since the other joints of the foot would be "used more than * * * normally." (R.T. 188, 189)

There was no testimony of claim that there was any residual disability attributable to the fracture of the pelvic bone or the injury to her mouth and her bridgework.

At the outset of the trial counsel for appellees, in his opening statement, informed the jury that Mrs. Kulikowski supports herself and her disabled husband. Appellant moved for a mistrial (R.T. 14, 15) which was denied by the District Judge as not being "sufficiently prejudicial." Despite this indication from the Court that this inquiry was improper, counsel for appellees, well knowing what the answer would be, inquired of Mrs. Kulikowski on the

witness stand "And what does your husband do?" to which the answer was "He is a totally disabled veteran." (R.T. 109)[1] And, again, in his closing argument counsel for appellees referred to Mrs. Kulikowski "* * * this little lady, who supports a disabled husband * * *"

There was absolutely no evidence from which it could be concluded or inferred that Mrs. Kulikowski had suffered or would suffer any loss of future earnings. Indeed, the evidence was to the contrary. (R.T. 161)

There was no evidence from which the monetary value of pain, suffering or discomfort per unit of time could be measured. Yet counsel for appellees, without either the benefit of a statement of the basis of his expertise or exposure to cross-examination freely testified before the jury in his opening and closing argument as to such a standard to be utilized by the jury in reaching their verdict.

Furthermore, counsel for appellees in effect castigated trial counsel for appellant for failing to express a personal view as to the proper damage verdict of the jury and asserted, in effect, that there was something improper in this ethical delicacy on the part of appellant's counsel.

> "Now, you will sit in a lot of lawsuits, and I think you will ultimately conclude, as I conclude, my duty is a twofold responsibility, one, as an officer of this court *bound by the rules of evidence, the ethics of the*

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1. In the case of *Sanchez v. Stremel*, 391 P.2d 557, 95 Ariz. 392, the Arizona Supreme Court at page 560 in the Pacific Reporter makes this statement:

> "The rule in personal injury actions is that it is improper for either party to introduce evidence that he has a wife and family dependent upon him, where such evidence is immaterial, or creates sympathy or prejudice. Udall, Arizona Law of Evidence, § 111. 'Misconduct [of counsel] which is *calculated* to create sympathy or prejudice and *may* have done so justifies the grant of a new trial.' Fitzpatrick v. St. Louis-San Francisco R. Co., 327 S.W. 801, 80 A.L.R. 2d 825. (Mo. 1959, emphasis in original)."

profession, and as an officer, *a servant of the jury* * * * and I have never known of an adversary proceeding where an advocate did not give the jury *his best estimate, some guidelines,* some thoughts, as to what is appropriate, *what is fair, as a verdict. But he didn't do that, did he? He didn't do that.*" (Closing argument of Mr. Rosengren, R.T. 327, 328) (Emphasis added)

In his opening argument (R.T. 293 et seq.) counsel for appellee testified as to what was the fair and reasonable value of damage aspects of Mrs. Kulikowski's claims as to which there was no other opinion evidence in the record. He first stated: (R.T. 293)

"The real issue, then—money damages. What is it, on behalf of Mrs. Kulikowski? Well, we know the old car was worth $150. We agreed on that. * * *

"What is the kind of relief that *I think is appropriate* for Mrs. Kulikowski? * * *

"* * * I am going to put them forth now in my advisory capacity as her lawyer."

Counsel then wrote on the board: (R.T. 294, 295)

"The car, $150.
"Lost wages $3500.
"Medical bills $3700.
"Cost of fusion of ankle (anticipated) $1000.
"Past pain $15,000—(first 2 years)

(Counsel here interpolated:

"I know from having reviewed your backgrounds that some of you are acquainted with what it means to be on crutches, and I ask you just to think about for a moment what it would be like for a woman who doesn't have the musculature of a man, it's even more difficult to ambulate * * *") (T.R. 295) (Emphasis added)

Counsel then said: "I am suggesting to you that for the first two years * * * that $7,500 a year is not inappropriate."

"Past pain (last three years prior to trial) $2000. per year (I am suggesting that that pain at the sum of $2000. a year.)"

$6000.

Counsel then stated: (R.T. 296)

"There is a lot of these things, *and I want you to rely on your own experience,* your own wisdom, but I do not think it would be appropriate to shunt aside what excruciating pain was." (Emphasis added)

Future pain (counsel stated "* * * and his Honor is going to tell you *her life expectation* is 25 years. * * * I am suggesting $2000. a year for *her life expectation.* * * * All right. Future pain, $2000. a year, 25 years, that's $50,000.")

"Now, then, what is left? * * *—so I am saying for her earning capacity, injury to her earning capacity, a thousand dollars a year for her 12 remaining years at work because she is what, she is 53. We assume she will retire at 65.

Loss of earning capacity $12,000.

"Add it up, and if my arithmetic is not incorrect, $91,350." (R.T. 298)

Counsel then said: (R.T. 298)

"* * * I would like to leave you with this thought as regards the $91,350.00 verdict, that *I think it is fair and equitable.*" (Emphasis added)

Counsel then followed this testimony as to his opinion as to the value of the various intangible injury aspects of Mrs. Kulikowski's claims with a reference to the value of property rights—inanimate things, the plain thrust of which was that his valuation of the injuries suffered by Mrs. Kulikowski was equally valid as the valuation of the

damage to Mrs. Williams' car or other property having a recognized market value.

In his closing argument counsel for appellees argued:

> "And Mr. Perry specifically accused me, and I wrote it down, of chicanery and legerdemain. Well, chicanery is close to fraud, and legerdemain is trickery. And what for? In putting on the board specific sums of money that *I think are fair, just, equitable and appropriate.*
>
> Mr. Perry: "Excuse me, if the Court please. We object. It's not within the realm of proper rebuttal.
>
> The Court: I think he may proceed." (R.T. 327) (Emphasis added)

(Then followed the argument criticizing Mr. Perry's failure to express his personal opinion referred to supra.)

While the entire tenor of the argument of counsel for appellees in opening and closing was couched in the format of an emotional appeal with overtones of "You are here to right wrongs, and you have broad latitude to ameliorate a hardship", (R.T. 339) this approach, standing alone, would not justify this appeal. However, it set the stage for the jury's blind acceptance of counsel's unsworn and unwarranted testimony as to his opinion as to what damages would be "just, fair, equitable and appropriate."

Counsel for appellees' opinion as to a "fair, just, equitable and appropriate" verdict—$91,350.00.

The jury's verdict? $91,350.00 for a damaged left ankle.

SPECIFICATION OF ERRORS RELIED UPON

I

The denial by the District Judge of appellant's Motion for a New Trial constituted an abuse of discretion as a matter of law for the reasons:

1. The jury's verdict was grossly excessive in allowing damages in the amount of $91,350.00 for an injury

> settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny,* which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts* ought to exercise unflinchingly.'" (Italics supplied by Court) 166 F.2d at 407, 408

This is and should be particularly true when the record discloses that unsworn, opinion evidence, injected into the case against the backdrop of an inflammatory argument of counsel has been the springboard which catapulted the jury's damage views above the horizon of reason and a fair appraisal of the injuries of the appellee.

The Verdict and Judgment Is Grossly Excessive.

The net of appellee's present injury is a damaged left ankle. There is no claim or evidence of any continuing pain or disability from any of the other injuries appellee suffered. Dr. Nichols testified that a relatively simple fusion operation costing in total about $1000. would free the ankle from continued pain and, while there would be some continuing discomfort, it plainly would not be serious.

The jury allowed, at counsel's urging, *the cost of this operation and also, at counsel's urging, pain and suffering for 25 years as if the operation were not performed.*

In effect the jury awarded $50,000. in damages for the pain and suffering associated with the condition of the ankle at the time of the trial, a condition which was only

temporary and subject to almost complete amelioration with the funds for this operation also provided by the jury's verdict.

Appellant respectfully urges that the test for reversal by a Court of Appeals of a District Judge's refusal to grant a new trial for abuse of discretion as a matter of law has been met.

The Verdict of the Jury Made an Allowance for Injury to Appellee, Mrs. Kulikowski's Earning Capacity with No Evidence to Support Such an Allowance.

The record is clear that appellee, Mrs. Kulikowski, once she returned to work, worked regularly. (R.T. 161) Her work did not require that she be on her feet or to move around while working (R.T. 122) She recovered in full for her loss of wages while off work—$3,500.00—and lost no wages after she returned to work, yet, at counsel's urging the jury allowed her $1,000.00 per year for loss of wages which to date of trial *she had not lost* and as to which there was no evidence she would ever suffer any loss. Add to this the $50,000.00 allowed by the jury, also at counsel for appellees' urging, for 25 years of pain and suffering which was to be obviated by an ankle fusion operation financed by funds also included in the verdict of the jury and it is clear that $62,500.00 of the jury's verdict is wholly without substantial or any real support in the evidence.

The Unsworn Opinion Testimony of Appellees' Counsel.

Canon 15, Canons of Professional Ethics, provides, in part:

> "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause."

The application of this canon is clear but we need not rest upon considerations of ethical propriety to support a finding that gross error was introduced into the case by the conduct of counsel for the appellees. That such error was most prejudicial does not admit of doubt when the total of the damages counsel advised the jury in his opinion would be "fair, just and equitable" is compared with and found to be *the exact amount of the verdict of the jury.*

We need not seek to persuade the Court to become involved in the controversy sparked by *Botta v. Brunner,* 26 N.J. 82, 138 A.2d 713 (1958). This appeal does not involve an objective use of the "unit of time" argument by counsel for a personal injury plaintiff; it involves the injection by a plaintiff's counsel of his unsworn opinion evidence as to the fair damage award which a jury should make for various injury claims of the injured client. Whether we relate this improper tactic to a "unit of time" plus blackboard argument or *to any other expression of counsel's personal opinion* as to the decision which the jury in their deliberations should reach, it is plain wrong and reversible error.

To place the problem in its true posture:

Suppose Mr. Rosengren prior to resting his case had called a prominent attorney specializing in handling personal injury claims for plaintiffs as a witness and posed a hypothetical question to him, as an expert in personal injury damage awards, as to what in his opinion would be a fair, equitable and appropriate award to appellee Kulikowski for her various claimed injuries. Certainly no Court in the land would permit such testimony and, if permitted, certainly no Appellate Court in the land would hesitate to reverse out of hand a judgment bottomed upon such testimony.

Was not the action of counsel for appellees himself testifying, for testify he did, as to what in his opinion a

fair award would be for pain and suffering, loss of earning capacity and related unliquidated damage claims equally prejudicial to the expert's suggested testimony?

Is his testimony legally more palatable because it was unsworn?

Should it be considered less harmful because he did not assume the role of a paid expert witness testifying from the witness stand and exposed to cross-examination?

In fact, did he not worm his way into the confidence of the jury with his repeated assurances of his fairness, his desire that the jury do justice, that if Petra Williams be entitled to recover that the jury award her *full* damages? And then, in the role of an expert adviser, a "servant of the jury" (R.T. 327) infect the entire integrity of the trial with unsupported, overreaching expressions of his opinion as to what would be fair and just when he was in fact a paid witness with his compensation related directly to the amount by which he could inflate the jury's verdict.

In the early case of *Union Pacific R. Co. v. Field,* 137 F. 14 (C.A. 8), the Court said:

> "In the case at bar the zeal of counsel for the plaintiff carried him beyond the limits of fair argument, presented to the jury facts that were not in evidence, and insinuated a misleading measure of damages. The vice of his action was not extracted by retraction, or by any specific charge of the court. It is not uncertain that it was not prejudicial to the defendant; nay, it is probable—almost certain—that it was prejudicial. The trial therefore was not fair and impartial, and the defendant is entitled to another."

We see no point in parading cases before the Court in endless review merely to demonstrate either our learning or our energy.

The principles governing a Court of Appeals in reviewing the denial of a Motion for a New Trial by a District

Judge because of excessive damages allowed by a jury, which allowance was procured through improper injection of unsworn opinion evidence of counsel in argument to the jury, are well known. Each case must be judged upon its peculiar facts. Appellant has not found any precedents sufficiently in point on the facts to be helpful.

CONCLUSION

It is respectfully urged that appellant Petra Williams, for all the reasons above stated, was denied a fair trial; she "should have another one."

SNELL & WILMER

By MARK WILMER
400 Security Building
Phoenix, Arizona 85004

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARK WILMER
Attorney